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IN THE

Supreme Court of the United States

October Term, 1946
No. 46

RICHFIELD OIL CORPORATION, a corporation,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
Appellee.

APPELLANT'S OPENING BRIEF.

NORMAN S. STERRY,
1000 Banks-Huntley Building, Los Angeles 14, Calif.,
ROBERT E. PARADISE,
610 Title Insurance Building, Los Angeles 13, Calif.,
Counsel for Appellant.

GIBSON, DUNN & CRUTCHER,
LLOYD & PARADISE,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

SUBJECT INDEX.

PAGE

References to the official reports of the opinions of the Supreme Court of the State of California 1

Statement of the grounds upon which the jurisdiction of this court is invoked 2

Finality of the judgment of the Supreme Court of California within the meaning of Section 237 of the Judicial Code 6

Statement of the case 18

Specifications of the assigned errors intended to be urged by appellant 22

Summary of argument 26

Argument 32

I.

The Supreme Court of California erred in its decision that no exportation of the oil commenced until after the "Nucula" had started from the marine terminal to New Zealand 34

II.

The Supreme Court of the State of California erred in its determination that the power of the State to tax exports is coextensive with its power to tax interstate commerce and that because the tax here levied was nondiscriminatory it did not violate the unqualified constitutional prohibition against taxation of imports or exports 56

III.

The Supreme Court of the State of California erred in determining that the tax could be sustained as an excise tax for the privilege of conducting a retail business in California 66

Conclusion 72

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Almy v. California, 24 Howard 169	70
American Steel & Wire Co. v. Speed, 192 U. S. 500	61, 62, 70
Anderson v. Aronsohn, 63 Cal. App. 737, 219 Pac. 1017	8
Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218	69, 71
Baird, Estate of, 193 Cal. 225, 223 Pac. 974	8, 15
Blount v. Munroe, 60 Ga. 61	34, 54
Boston etc. Company v. Rosenthal, 68 Cal. App. (2d) 564, 156 P. (2d) 963	39
Brett v. S. H. Frank & Company, 162 Cal. 735, 124 Pac. 437	8
Brown v. Maryland, 12 Wheat. 419	67, 68, 69
Carson Petroleum Co. v. Vial, 279 U. S. 95	41, 49, 53
Central Savings Bank of Oakland v. Lake, 201 Cal. 438, 257 Pac. 521	6
Chicago etc. Co. v. Perry, 259 U. S. 548	5
Clark v. Williard, 292 U. S. 112	15, 16
Clarke & Co. v. Clarke, 3 Woods 408, Fed. Cases No. 2846, p. 943	35, 36, 54, 64
Clayton v. Schultz, 18 Cal. (2d) 328, 115 P. (2d) 446	8
Coats v. General Motors Corporation, 11 Cal. (2d) 601, 81 P. (2d) 906	9
Coe v. Errol, 116 U. S. 517	48, 49, 51
Cook v. Pennsylvania, 97 U. S. 566	34, 64
Crew Levick v. Pennsylvania, 245 U. S. 292	64, 70, 71
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282	5
Davis v. Edmonds, 218 Cal. 355, 23 P. (2d) 289	9
Department of Banking v. Pink, 317 U. S. 264	7
Department of the Treasury v. Wood Preserving Corporation, 313 U. S. 62	29, 56, 57, 58

PAGE

Erlin v. National Union Fire Ins. Co., 7 Cal. (2d) 547, 61 P. (2d) 756 6

Erie Railroad Company v. Purdy, 185 U. S. 148 6

Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265 5

Fairbanks v. United States, 181 U. S. 283 ..... 37, 60

First National Bank v. Anderson, 269 U. S. 341 5

Globe Varnish Company, In re, 114 F. (2d) 916 ..... 39, 41

Gulf Refining Company v. United States, 269 U. S. 125 ..... 12, 14

Hooven & Allison Co. v. Evatt, 324 U. S. 652 ..... 40, 59, 61, 69

Hughes Bros. Timber Co. v. Minnesota, 272 U. S. 469 ..... 47, 53

International Harvester Company v. Department of Treasury of Indiana, 322 U. S. 340 ..... 29, 58

Kahn v. Royal Indemnity Company, 63 Cal. App. 278, 218 Pac. 444 8

Low v. Austin, 13 Wall. 29 ..... 61, 63, 69

Market Street Railway Company v. Railroad Commission, 324 U. S. 548 ..... 4, 11

Martyn v. Western Pacific Railway, 21 Cal. App. 589, 132 Pac. 602 39

McGoldrick v. Berwind-White Coal Mining Company, 309 U. S. 33 57

Metropolitan Water Company v. Kaw Valley Drainage District, 223 U. S. 519 12

Moody & Sons v. Century Savings Bank, 239 U. S. 374 12

Monson v. Fischer, 219 Cal. 290, 26 P. (2d) 6 6

Mower v. Fletcher, 114 U. S. 127 11

Murdock v. Pennsylvania, 319 U. S. 105 ..... 62, 63, 67

Nelson Bros. Coal Co. v. Berryman, 48 F. (2d) 99 39

N. Y. and Cuba Mail S. S. Co. v. United States, 125 Fed. 320 37

Nickey v. State of Mississippi, 292 U. S. 393 5

Nippert v. City of Richmond (not yet officially reported), 90 L. Ed. 496 ..... 54, 55, 58

PAGE

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90.. 38
Railroad Commission v. Worthington, 225 U. S. 101..... 50
Railroad Commission of Louisiana v. Texas etc. Co., 229 U. S. 336 .....53, 54
Richfield Oil Corporation v. State Board of Equalization, 27 A. C. 150, 163 P. (2d) 1..... 4
Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498..... 53
Sonneborn Bros. v. Keeling, 262 U. S. 506..... 60
Spalding & Brothers v. Edwards, 262 U. S. 66.....
.....28, 39, 41, 43, 44, 53, 59
Standard Oil Co. v. Johnson, 56 Cal. App. (2d) 411, 132 P. (2d) 910 62
Standard Oil Company v. Johnson, 316 U. S. 481.....4, 62
State Board of Equalization v. Blind Bull Coal Co., 101 P. (2d) 70 62
Steelduct Co. v. Henger-Seltzer Co., 26 Cal. (2d) 634, 160 P. (2d) 804 9
Sully v. American National Bank, 178 U. S. 289..... 5
Texas & New Orleans Railroad Company v. Sabine Tram Company, 227 U. S. 111.....51, 53
Thames & Mersey Insurance Company v. United States, 237 U. S. 19..... 37
United States v. County of Allegheny, 322 U. S. 174.....
.....5, 6, 12, 59, 62, 65
United States v. Hvoslef, 237 U. S. 1.....37, 69
Washington Chocolate Co. v. King County, 152 P. (2d) 981..... 62
Western Oil Refining Company v. Lipscomb, 244 U. S. 346....50, 51
Whitfield v. Ohio, 297 U. S. 431..... 5
Willcuts v. Bunn, 282 U. S. 216..... 37
Wm. E. Peck & Co. v. Lowe, 247 U. S. 165..... 70
Wisconsin v. J. C. Penney Company, 311 U. S. 435.....29, 56, 57

PAGE

Woodruff v. Parham, 8 Wall. 123 60
Young v. Southern Pacific Company, 189 Cal. 746, 210 Pac. 259 8

STATUTES.

California Retail Sales Tax Act of 1933, Chap. 1020 (Stats. 1933 as amended by Stats. 1935, Chaps. 351, 355, 357) 2, 22, 23, 56
California Retail Sales Tax, Sec. 5 2
California Retail Sales Tax Act, Sec. 23 ..... 9, 10
California Retail Sales Tax Act, Sec. 31 ..... 9, 10
California Rules on Appeal, Rule 24 4
United States Constitution, Art. I, Sec. 10, Clause 2 ..... 22, 23, 25, 26, 30, 32, 36, 56, 59, 63
Judicial Code, Sec. 237 4
40 U. S. Stats. at Large, 300 41

TEXTBOOKS.

43 Columbia Law Review (1943), pp. 1002, 1004 16
48 Harvard Law Review (1934-35), pp. 302, 303-4, 308-9 17

INDEX TO APPENDIX.

PAGE

Provisions of the Retail Sales Tax Act of 1933, as amended:

Sec. 2. Definitions. (Deering's General Laws of California, 1935 Supplement, pp. 1956 and 1957) 1

Sec. 3. Rate of tax. Deering's General Laws of California, 1935 Supplement, pp. 1957 and 1958) 4

Sec. 5. Exemptions. (Deering's General Laws of California, 1935 Supplement, p. 1958) 4

Sec. 8. Unlawful to advertise absorption of tax. (Deering's General Laws of California, 1937, Vol. 2, p. 3895) 5

Sec. 8½. Retailer to collect tax. (Deering's General Laws of California, 1937, Vol. 2, p. 3895) 5

Sec. 12. Retailer's permit: Application: Violation of section a misdemeanor. (Deering's General Laws of California, 1937, Vol. 2, pp. 3896 and 3897) 5

Sec. 13. Permit fee. (Deering's General Laws of California, 1937, Vol. 2, p. 3897) 6

Sec. 15. Life of permit: Renewal fee. (Deering's General Laws of California, 1935 Supp., p. 1959) 6

Sec. 23. Overpayments: Credits and refunds: Claims: Interest: Recovery of erroneous refunds and credits: Illegal levies: Intentional overpayments. (Deering's General Laws of California, 1941 Supp., pp. 2321 and 2322) 7

Sec. 31. Remedies of taxpayer: Action to recover tax paid: Prerequisites to action: Time for commencement: Execution of judgment: Assignees. (Deering's General Laws of California, 1939 Supp., p. 1589) 8

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APPELLANT'S OPENING BRIEF.

References to the Official Reports of the Opinions of the Supreme Court of the State of California.

Neither the first nor second decision of the Supreme Court of California has been officially reported at the time of writing this brief. The first decision of the Court is unofficially reported in 155 P. (2d) 1, and is found in the Record at pages 71-85. Its second and final decision rendered after a rehearing is unofficially reported in 27 A. C. 150, 163 P. (2d) 1, and is found in the Record at pages 85 to 98.

Statement of the Grounds Upon Which the Jurisdiction of This Court Is Invoked.

The suit was instituted by appellant to recover a tax which the appellee had levied upon a cargo of fuel oil sold to the New Zealand Government Stores Control Board (hereinafter for brevity referred to as the "Control Board") for exportation by a vessel of the New Zealand Government to the Naval Officer in Charge at Auckland, New Zealand, which oil was so exported [Compl. V-X, R. 2-9]. All averments of the complaint, other than that the sale was an export sale and the tax one upon an export, were admitted by the answer [R. 16-17].

The tax was levied under and by virtue of the California Retail Sales Tax Act of 1933, Chapter 1020, California Statutes of 1933 as amended by Chapters 351, 355 and 357, California Statutes of 1935 (for brevity sometimes hereinafter referred to as the "Sales Tax Act"). In its final opinion the Supreme Court of California has referred to the sections of the California Revenue and Taxation Code in which that Act was incorporated subsequent to the sale here involved. The applicable sections of the Act in force at the time of the sale are attached as an appendix to this brief. Concisely, the statute levied a tax of three per cent on the gross receipts of any retail sale of personal property in California, and Section 5 of the Act specifically exempted the sales upon which a tax was prohibited either by the Constitution of the United States or of California.

In Paragraph IX of the complaint it is alleged:

> "That if the California Retail Sales Tax Act, as amended, be construed, applied or enforced in

such manner to impose said tax upon said sale of fuel oil hereinabove described, the said California Retail Sales Tax Act is invalid, illegal and unenforceable and contrary to and in violation of the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States of America." [R. 9.]

Precisely the same charge was made in the Claim for Refund [R. 15].

The trial court reached the conclusion [R. 65]:

> "That if the said California Retail Sales Tax Act as amended be construed, applied or enforced in such manner as to impose a tax upon said sale of fuel oil hereinbefore described, said Act is invalid, illegal and unenforcible, in that it is contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the Constitution of the United States." [R. 65, Conclusions of Law IV.]

Judgment was entered for the appellant [R. 65].

The Appellee Board appealed to the Supreme Court of California which affirmed the judgment [155 P. (2d) 1; R. 71-78], Justice Carter dissenting [155 P. (2d) 1, 5-9; R. 79-85]. A rehearing was granted and the judgment appealed from was reversed. The final opinion of the Supreme Court reversing the judgment of the trial court was rendered on November 1, 1945 [163 P. (2d) 1; R. 85-92], the Chief Justice and Justice Edmonds dissenting

[163 P. (2d) 1, 5-8; R. 92-98]. In its final opinion the majority of the California Supreme Court said:

> "Plaintiff invokes the Constitution of the United States as a bar to the collection of the tax. * * * 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, * * *'.
>
> "It should be clear that the sales tax imposed in the instant case does not violate the United States Constitution."
>
> *Richfield Oil Corporation v. State Board of Equalization,* 27 A. C. 150, 152, 163 P. (2d) 1, 2. [R. 87.]

On November 29, 1945, a rehearing was denied, and the Supreme Court of California thereafter had no power to review or modify its decision. See:

Rule 24, *California Rules on Appeal;*

Market Street Railway Company v. Railroad Commission, 324 U. S. 548.

An appeal to this Court was duly allowed by the Chief Justice of the Supreme Court of the State of California on January 17, 1946 [R. 103, 104].

Since both in the complaint and in its claim for refund appellant directly charged that the Sales Tax Act, if construed, applied or enforced so as to impose a tax on the said sale, was in contravention of the Federal Constitution, this Court under Section 237 of the Judicial Code has jurisdiction of the appeal. See:

Standard Oil Company v. Johnson, 316 U. S. 481, 482-3;

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 289;

First National Bank v. Anderson, 269 U. S. 341, 345-6;

United States v. County of Allegheny, 322 U. S. 174, 192.

Such jurisdiction of the appeal also attaches because it appears from the face of the opinion of the court below that the constitutionality of the statute as construed and applied was involved and considered by it. See:

Chicago etc. Co. v. Perry, 259 U. S. 548, 551;

Sully v. American National Bank, 178 U. S. 289, 298;

Nickey v. State of Mississippi, 292 U. S. 393, 394;

Whitfield v. Ohio, 297 U. S. 431, 435-6.

Appellee, in its Statement in Opposition to Jurisdiction, asserts on pages 3 and 4 that the appeal does not involve the validity of a state statute. This is based upon the contention that the statute cannot be in violation of the Federal Constitution since it expressly exempts sales the taxation of which are forbidden by the Federal Constitution. The answer is that the California Supreme Court in its last and final decision construed the statute as not exempting the tax upon the sale here involved, and this decision presents the constitutional question as to whether the statute as so construed, enforced and applied, is repugnant to the Federal Constitution. See:

Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 270;

United States v. County of Allegheny, supra, 322 U. S. 174, 184;

Erie Railroad Company v. Purdy, 185 U. S. 148, 154.

Brief which we were permitted to file in answer to the Statement in Opposition to Jurisdiction (hereafter for brevity referred to as "our brief"), pp. 9-14, where the point is more fully discussed and pertinent portions of the above cited decisions quoted.

THE JUDGMENT OF THE SUPREME COURT OF CALIFORNIA WAS FINAL WITHIN THE MEANING OF SECTION 237 OF THE JUDICIAL CODE.

As the question of the jurisdiction of this Court was reserved for argument on the merits, we take the liberty of somewhat amplifying our brief on the point of the finality of the judgment.

Unless otherwise noted, all emphasis throughout this discussion and our argument on the merits will be ours.

The appellee filed a Statement in Opposition to Jurisdiction in which it took the position that the judgment of the Supreme Court of California was not final because it reversed the case without directions, citing:

Central Savings Bank of Oakland v. Lake, 201 Cal. 438, 443, 257 Pac. 521, 523;

Monson v. Fischer, 219 Cal. 290, 291, 26 P. (2d) 6;

Erlin v. National Union Fire Ins. Co., 7 Cal. (2d) 547, 549, 61 P. (2d) 756, 757.

While these cases sustain the proposition that ordinarily in California a reversal without directions leaves the case at large with the right in the parties to amend the pleadings or present different proof, this procedure is not open in the case at bar. In this particular case nothing remains but the ministerial entry by the trial court of a judgment for defendant.

In determining the finality of the judgment appealed from, this Court may examine the record presented to it. See:

Department of Banking v. Pink, 317 U. S. 264, 268.

The opinion of the trial court speaks of the facts as being stipulated to [R. 32]. However, an examination of the stipulations [R. 18-20; 31-32; 66-67] will show that they are only supplemental to the facts alleged in the complaint, merely attaching and setting forth the various documents referred to in the pleadings and in the claim for refund, and that the sale on which the tax was levied was the second of two sales under a contract between appellant's predecessor in interest and the Control Board; that the appellant started pumping the oil from its tank farm to the storage tanks at Marine Terminal on receipt of wireless message of the approach of the "Nucula," and the oil was pumped from the latter tanks into the "Nucula" as soon as the vessel was ready to receive it [R. 18-19]. All the essential facts which appellant claims constituted an export sale within the meaning of the constitutional prohibition against a state tax thereon are set forth in the complaint and also in its claim for refund. [Compl. VI, VII, R. 4-8, Ex. "B",

R. 11-15], and are admitted by the answer [Ans. I-V, R. 16-17].

The California Supreme Court in its last and final opinion based its decision upon the facts alleged in the complaint and the claim for refund, and held that as a matter of law those facts did not disclose an export sale within the meaning of the Federal Constitution, and that the conclusion of the trial court heretofore quoted [R. 64-65], to the effect that if the act were construed or applied as imposing a tax upon the sale it was in contravention of the Constitution, was erroneous. Under the law of California this decision has become the law of the case and may not be reexamined either by the Superior Court or the Supreme Court of California.

> "The rule of the law of the case may be succinctly stated as the rule requiring both trial and appellate courts to follow the rules laid down upon a former appeal *whether such rules are right or wrong.*"
>
> *Estate of Baird*, 193 Cal. 225, 234, 223 P. 974, 978. (Cited in our brief, p. 6.)

See, also, to the same effect:

Clayton v. Schultz, 18 Cal. (2d) 328, 332-3, 115 P. (2d) 446, 447-8;

Young v. Southern Pacific Company, 189 Cal. 746, 749, 210 P. 259, 264;

Brett v. S. H. Frank & Company, 162 Cal. 735, 739, 124 P. 437, 439;

Anderson v. Aronsohn, 63 Cal. App. 737, 744, 219 P. 1017, 1020;

Kahn v. Royal Indemnity Company, 63 Cal. App. 278, 281-2, 218 P. 444, 446;

Coats v. General Motors Corporation, 11 Cal. (2d) 601, 607, 81 P. (2d) 906, 909;

Steelduct Co. v. Henger-Seltzer Co., 26 Cal. (2d) 634, 642-4, 160 P. (2d) 804, 808;

Davis v. Edmonds, 218 Cal. 355, 358-9, 23 P. (2d) 289, 290.

From the facts admitted by the pleadings and stipulated to by the parties, it is apparent there is nothing to retry, even if this were an action prosecuted under the general laws of the State of California. However, the action is not one brought under the general laws of the State. Being against the State, it can be instituted only in the way and manner permitted by the State. Under Sections 23 and 31 of the California Retail Sales Tax Act, the taxpayer was prohibited from enjoining the payment of any levy, his only remedy being to pay the tax under protest and thereafter to file a claim for refund setting forth "the specific grounds upon which the claim is founded," and in the event the claim was denied, to bring suit *within ninety days on the grounds set forth in his claim for refund.*[1]

---

[1]The applicable portions of Sections 23 and 31 of the Retail Sales Tax Act in force at the time of the filing of the claim for refund and institution of the suit read:

Section 23: "* * * No refund shall be allowed unless a claim therefore is filed with the State Board of Equalization. * * * Every such claim must be in writing and must state the specific grounds upon which the claim is founded. * * *"

Section 31: "* * * No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the collection under this act of any tax sought to be collected and no suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally assessed

While it is apparent that if this were an action under the general laws of this state there would be no practical possibility of the appellant amending its complaint or presenting any other or different facts, *under the statute it is legally impossible for it so to do.* The decision of the Supreme Court of the State of California that the facts set out in the claim for refund and upon which the suit was based did not constitute an export sale, and that construing and applying the California Retail Sales Tax Act as requiring a tax on that sale does not render the statute repugnant to the Federal Constitution, is a final and conclusive determination not only of that question but of the entire case. No other or further evidence can be taken; no other or further issues can be raised or tried. There remains nothing for the trial court to do but to perform the ministerial task of entering judgment for the defendant.

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or collected unless a claim for refund or credit has been duly filed as provided in section 23 hereof.

"*Within ninety days after* the mailing of the notice of the board's action upon such claim, the claimant may bring an action against the board *on the grounds set forth in such claim in a court of competent jurisdiction in the county of Sacramento* for the recovery of the whole or any part of the amount with respect to which such claim has been disallowed.

"If the board fails to mail notice of action on any such claim within six months after the claim is filed the claimant may, prior to mailing notice of action on such claim by the board, consider the claim disallowed and bring an action against the board on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment. *Failure to bring suit or action within the time specified shall constitute a waiver of any and all demands against this State on account of any alleged overpayments hereunder.*" (Italics are ours.)

California Retail Sales Tax Act, Secs. 23 and 31.

We again call the Court's attention to its early decision in *Mower v. Fletcher*, 114 U. S. 127, 128, cited and quoted from in our brief, pages 3-4, wherein it is said, in part:

> "That judgment is final for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered."
>
> *Mower v. Fletcher*, 114 U. S. 127, 128.

The observations of this Court in *Market Street Railway Company v. Railroad Commission, supra*, 324 U. S. 548, 551, are most pertinent:

> "Our jurisdiction to review a state court judgment is confined by long-standing statute to one which is final. Judicial Code, §237, 28 U. S. C. §344. Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.
>
> "We have held that finality of a judgment of a state court for determining the time within which our jurisdiction to review may be invoked *is not controlled by the designation applied in state practice.* Department of Banking v. Pink, 317 U. S. 264; Cole v. Violette, 319 U. S. 581. *The judgment for our purposes is final when the issues are adjudged.*"
>
> *Market Street R. Co. v. Railroad Commission of California*, 324 U. S. 548, 551.

Tested by the rule of the last two cases above quoted, the last judgment of the Supreme Court of California is certainly final. It is the judgment of the court of last resort of the state. It has finally adjudged all the issues, and no California court can further review or modify that judgment. Under that judgment, the Superior Court has no discretion other than to enter judgment for the defendant on the pleadings. If this Court reverses the judgment of the Supreme Court of California, that tribunal would have nothing to do other than to execute the judgment of this Court by issuing its remittitur affirming the judgment of the Superior Court in favor of plaintiff. If this Court should affirm the judgment of the Supreme Court of California, there would be no further action by the Supreme Court of California, and the Superior Court, acting under the judgment appealed from, would be without discretion to take any action other than entering judgment for the defendant.

See, also:

Metropolitan Water Company v. Kaw Valley Drainage District, 223 U. S. 519, 523. (Cited and quoted from in our brief, pp. 6-7);

Moody & Sons v. Century Savings Bank, 239 U. S. 374, 376;

United States v. County of Allegheny, supra, 322 U. S. 174, 192.

In *Gulf Refining Company v. United States* 269 U. S. 125, 135-6, suit was instituted in the Federal District Court to quiet title to land and for an accounting for oil taken from the land. After a decision by this Court settling the title and remanding the case for an accounting, the parties filed a written stipulation that if the

Court should hold that the plaintiff was entitled to recover the net value of the oil produced after January 1, 1918, judgment should be entered for a certain amount, and further that the total value of all the fuel produced from the beginning of operations until the abandonment of the land was less than the cost of production. The Court entered judgment that the government take nothing, and on appeal the Circuit Court of Appeals reversed the judgment holding that the defendants were not entitled to offset any part of the costs of production prior to January 1, 1918. On appeal to this Court, the government contended this Court was without jurisdiction because the judgment of the Circuit Court of Appeals was not final. In denying that contention, this Court said:

> "But the direction to proceed consistently with the opinion of the court has the effect of making the opinion a part of the mandate, as though it had been therein set out at length. Metropolitan Water Co. v. Kaw Valley District, 223 U. S. 519, 523. Under the stipulations above recited, the trial court was bound to enter decrees for the government for the stated sums of money if that court found that the government was entitled to recover the net value of the oil produced. The trial court found that the government was not so entitled and the decrees went accordingly. Turning to the opinion, it will be seen that the circuit court of appeals decided that the trial court erred 'in entering the decrees denying the complainant the right to recover the net value of the oil, etc.' The instruction for further proceedings not inconsistent with the opinion, therefore, was equivalent to a direction to render judgment for the net value—that is, for the exact sums set forth in the stipulation. See Moody v. Century Bank, 239

U. S. 374, 376; Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238, 241. *There was no evidence to be taken or considered, and no change in the issue was possible; nothing remained but the ministerial duty of entering a decree for the precise sums which had been fixed beyond the power of alteration. It follows that the jurisdictional objection is without merit.*"

Gulf Refining Co. v. United States, 269 U. S. 125, 135-6.

We submit that the status of the judgment appealed from in the above case as to finality is identical with the status of the judgment appealed from in the instant case. Here, as there, no evidence can be taken at a retrial, all of the incidental facts not admitted by the pleadings having been stipulated to by the parties. As we have pointed out, under the provisions of the California Retail Sales Tax Act, any change of issue would be as legalistically impossible as it would be practically impossible. While it is true that the California Supreme Court reversed the judgment of the trial court without direction, nevertheless, the opinion of the majority of the court below decided every issue in the case, and under the decision of the majority of the court below the trial court is as devoid of any discretion to render a judgment other than for the defendant as it would be if the opinion had specifically directed the entry of such judgment or the trial court to proceed in conformity with the opinion.

"It was no part of the trial court's function to determine whether the former appeal had been cor-

rectly decided; *its sole duty was to follow without question the principles established by that decision.*"

Estate of Baird, supra, 193 Cal. 225, 258.

In *Clark v. Williard,* 292 U. S. 112, 117-118, the controversy was between the petitioner as receiver of a foreign corporation and the respondent as trustee of certain judgment creditors, the respondent having intervened in the receivership matter by petition for leave to have execution issued upon a final judgment rendered in the state court. The District Court of Montana adjudged that petitioner was the successor to the corporation, and that its assets should be ratably distributed, and denied the petition. On appeal, the Supreme Court of Montana held that the assets were subject to attachment and execution, and reversed the order, remanding the case to the court, "for further proceedings in accordance with the opinion." In sustaining the jurisdiction of this Court to entertain writ of error, this Court, speaking through Justice Cardozo, said:

"Our jurisdiction to issue the writ is challenged on the ground that the decree to be reviewed is without the requisite finality. Judicial Code, §237; 28 U. S. C., §344. The challenge should not prevail. The decree of the Montana court is final to the extent that it confirms the respondents' execution and permits a levy that will override the liquidator's title. * * * By that opinion, which by reference was incorporated in the judgment

(Metropolitan Water Co. v. Kaw Valley District, 223 U. S. 519, 523; Gulf Refining Co. v. United States, 269 U. S. 125, 135), nothing was left to the discretion of the trial court in respect of the priority of the execution or of the respondents' rights thereunder."

Clark v. Williard, 292 U. S. 112, 117-118.

The above decision of this Court has been the subject of analysis and comment by at least two law reviews, both of which interpret the decision as permitting review by this Court of judgments of the status of the one here appealed from.

"Clark v. Williard marks a cleavage with this earlier line of authorities. In that case the state court judgment recited: 'For reasons stated in the opinion the judgment and orders appealed from are reversed and the cause remanded for further proceedings in accordance with the views expressed in the opinion.' Relying upon federal court precedents, the Court held that the judgment incorporated the opinion by reference, and that jurisdiction under Section 237 could be sustained since the opinion established that the case had been finally disposed of. *This is a sensible result which hardly seems to create any practical difficulties.* If the opinion and judgment, considered as a unit, show beyond doubt that, so far as the state courts are concerned, the controversy is wholly at an end, *it serves neither the ends of justice nor the purpose of the final judgment rule to require that review by the Supreme Court be postponed.*"

43 Columbia Law Review (1943), 1002, 1004.

"A judgment reversing a lower court and remanding the case for further proceedings has often been held not final. Nor is the rule changed if the remand is solely for the purpose of fixing damages. But a reversal will be considered final *which leaves but one eventuality open to the lower court, since to postpone an appeal until after the performance of purely ministerial functions below delays review unnecessarily with no countervailing advantage to the Court.*

"* * * * * * * *

"Suggestion has been made that the Court be empowered to review as a matter of discretion at any stage in the proceedings, but petitions for certiorari are perhaps too numerous already, and such a rule could serve only to place a greater load on an already over-burdened Court. Since the rule of finality as illustrated by the Clark case *is flexible enough to allow review when hardship would otherwise result, there seems no immediate necessity for change.*"

48 Harvard Law Review (1934-35), 302, 303-4, 308-9.

We submit that the judgment here appealed from is final within both the letter and spirit of the rule which this Court has always observed for testing the finality of a judgment of a state court, and that this Court should consider the important constitutional question presented by this appeal and decide the same upon its merits.

Statement of the Case.

As heretofore indicated in the discussion of the jurisdiction, the action was one to recover a tax levied by the appellee under the California Sales Tax Act upon the sale of fuel oil to the New Zealand Government Stores Control Board (heretofore and hereafter referred to as the "Control Board"). As stated, all the material facts are set out in the formal averments of the complaint [R. 1-9] and in the claim for refund attached to the complaint as Exhibit "B" [R. 11-15], and they are admitted by the answer [R. 16-17].

The case was submitted upon the pleadings and two stipulations of fact, appellee offering no evidence [R. 47]. The stipulations are found in the record, pages 18-30 and 31-32. Although unnecessary, because no issue of fact was presented by the pleading or proof, formal findings of fact and conclusions of law were made by the court [R. 48-65], the first finding being that all the allegations of the complaint were true [R. 48]. As there was no challenge of the accuracy of that finding by any of the majority or dissenting opinions of the Supreme Court of California, we will take the facts from the complaint except as otherwise indicated. Concisely, they are:

Appellant is the successor in interest of William C. McDuffie, as trustee of the Richfield Oil Company of California, having assumed all the obligations and liabilities of said trustee [Compl. III, R. 1-2]. In December 1936, the Control Board issued in New Zealand a written invitation for bids on one cargo of fuel oil for the New Zealand Division of the Royal Navy, specifying that delivery of the fuel oil should be "f.o.b. New Zealand Government tank steamer at any port beyond New Zea-

land specified by the tenderer," [Compl. VI, R. 4; Finding II, R. 48]. The bid of William C. McDuffie as trustee was accepted by the Control Board [Compl. VI, R. 5]. Thereafter, it was agreed that the Control Board could elect to purchase two cargoes instead of one if it so desired [Stip. R. 18-19], and under date of February 4, 1937, a written contract for the sale of two cargoes of fuel oil was entered into in New Zealand providing for delivery of each of said cargoes to be made into New Zealand Tank Steamer R.F.A. "Nucula" at Los Angeles, California, and that bills of lading and other customary shipping documents were to be handed to the Master of the "Nucula", and that the fuel oil was to be consigned to the Naval Officer in Charge at New Zealand [Compl. VI, R. 5; Stip. R. 18, 22-23]. While the two cargoes were handled in the same way, a tax was levied only upon the second cargo delivered to the "Nucula" [Stip. R. 19] and, therefore, the complaint and this statement are confined to that cargo.

Pursuant to the said written contract, the appellant, as successor in interest to said McDuffie, delivered to the New Zealand naval tank steamer R.F.A. "Nucula" 43,757 barrels of fuel oil in bulk [Compl. VI, R. 6], and at the same time the Master of the R.F.A. "Nucula" executed a bill of lading designating appellant as shipper and consigning the oil to the Naval Officer in Charge at Auckland, New Zealand [Compl. VI, R. 6]. A copy of the bill of lading, in the usual form of such documents, consigning the oil to said Naval Officer is found in the record, pages 27-30.

In connection with said delivery, appellant executed and filed in the office of the United States Collector of Cus-

toms at the Port of Los Angeles a Shipper's Export Declaration [Compl. VI, R. 6], which is found in the record at page 26a, and in connection with the delivery of said oil, appellant delivered to the Master of the R.F.A. "Nucula" the customary shipping documents consisting of copies of the run ticket, the inspector's certificate and the bill of lading [Compl. VI, R. 6].

Appellant was paid the purchase price therefor by the said Control Board [Compl. VI, R. 6], payment being made in London, England, to the duly authorized agent of appellant [Stip. R. 18]. Appellant has not collected or attempted to collect from the purchaser any sales tax [Compl. VI, R. 6-7]. The entire amount of the oil delivered was transported by the "Nucula" and delivered to the New Zealand Division of the Royal Navy at Auckland. No portion was delivered or unloaded at ports of the United States or used or consumed within the State of California or during the transportation [Compl. VI, R. 7].

The oil sold to the Control Board and delivered to the "Nucula" was manufactured by the appellant at the Richfield Refinery at Watson, California [Compl. VI, R. 7]. This refinery is located about midway between the City of Los Angeles and the Marine Terminal at Long Beach [Stip. R. 31], and at all times appellant and its predecessor in interest maintained storage tanks at the Marine Terminal connected with its refinery tanks at Watson by a pipeline [Stip. R. 31].

When appellant was advised that the "Nucula" was between 24 and 48 hours from the Marine Terminal, it started pumping oil from its refinery at Watson to the storage tanks at the Marine Terminal and continued until the tanks were full [Stip. R. 31-32].

At the time of trial, there were no records available as to whether the "Nucula" was ready to receive the oil before the entire cargo was pumped into the storage tanks, but the oil was not held in the tanks at the Marine Terminal more than 24 to 36 hours, and as soon as the "Nucula" had docked and was ready to receive the oil, appellant started pumping it from the storage tanks into the "Nucula" and continued steadily and without interruption until the entire cargo was delivered into the "Nucula" [Stip. R. 32].

The complaint alleged and the court found that it was the intention of the parties at all times that the oil should be exported from California to New Zealand and that the various facts detailed above were steps in a single transaction constituting an exportation of the said oil [Compl. VII, R. 7, 8, Findings 1, 12, 13, R. 48, 63, 64].

The appellee levied a three per cent tax upon the total sums paid for said fuel oil, which was paid under protest and a claim for refund made [Compl. V, R. 2-3; 11-15].

As stated, all of the above facts were either admitted in the answer or stipulated to, and are accepted as correct in both the first and last majority and minority opinions of the California Supreme Court.

Specifications of the Assigned Errors Intended to Be Urged by Appellant.

The appellant intends to urge each of its fourteen assigned errors found in the Transcript [R. 100-103] as follows:

(1) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in sustaining the validity of the California Retail Sales Tax Act of 1933, as amended, construed, applied and enforced to impose a tax upon the sale of fuel oil here involved, as against appellant's contention that said Act, so construed, applied and enforced, is invalid under Article I, Section 10, Clause 2, of the United States Constitution.

(2) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the California Retail Sales Tax Act of 1933, as amended, when construed and applied to impose a tax of 3% upon the sale of fuel oil to the New Zealand Government Stores Control Board for exportation to New Zealand, and which was so exported, is not invalid under and repugnant to the provisions of Article I, Section 10, Clause 2, of the United States Constitution.

(3) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the tax levied upon and collected from appellant, Richfield Oil Corporation, pursuant to the California Retail Sales Tax Act of 1933, as amended, was not an impost or duty on exports in violation of or repugnant to or within the meaning of Article I, Section 10, Clause 2, of the United States Constitution.

(4) The Supreme Court of the State of California erred in its final judgment in the above entitled cause

in its determination that any event that, under Article I, Section 10, Clause 2 of the Constitution of the United States, may be taxed under the California Retail Sales Tax Act of 1933, as amended, occurred prior to the commencement of the exportation of the oil to New Zealand.

(5) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the delivery of the oil and the passage of title to the said oil occurred prior to the commencement of the exportation of said oil.

(6) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that no exportation of the oil commenced until the vessel "Nucula" started to New Zealand.

(7) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the transportation of the oil from appellant's refinery to its Marine Terminal, and the delivery of the oil from the storage tanks at the Marine Terminal to the vessel "Nucula" were not movements of the oil in exportation to New Zealand.

(8) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in failing to give consideration or effect to:

(a) The New Zealand Government Stores Control Board's invitation for tenders which stated that the oil was "required by the New Zealand Division of the Royal Navy * * * for delivery f.o.b. N. Z. Government tank steamer at any port beyond New Zealand specified by the tenderer."

(b) The provisions of the sales contract which, among other things, required the delivery to the Master of the vessel "Nucula" of bills of lading and other customary shipping documents consigning the oil to the Naval Officer-in-Charge, Auckland, New Zealand.

(c) The execution of the bill of lading consigning the oil to the Naval Officer-in-Charge at Auckland, New Zealand.

(d) The execution and filing of the export declaration.

(e) The actual exportation of the oil to New Zealand pursuant to the contract, bill of lading, and export declaration.

(9) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the sale of oil was an intrastate sale instead of an export sale.

(10) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the power of the State to tax exports is co-extensive with and subject to the same limitations as its power to tax interstate commerce sales or transactions.

(11) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the tax levied upon appellant was

not invalid, illegal or unenforceable and was not contrary to, or in violation of, the provisions of Article I, Section 10, Clause 2, of the Constitution of the United States, because the said tax was non-discriminatory.

(12) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the provisions of the California Retail Sales Tax Act of 1933, as amended, construed and applied to impose a tax measured by the gross proceeds of the export sale of the oil here involved, could be sustained as an excise or privilege tax on the privilege of performing in California acts which were part of, or steps in, the exportation of said oil.

(13) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in its determination that the scope and effect of United States Constitution, Article I, Section 10, Clause 2 permits or requires different results as to the validity of a tax upon exports when (1) the goods are delivered for exportation to the purchaser's vessel, and (2) when the goods are delivered for exportation to a common carrier.

(14) The Supreme Court of the State of California erred in its final judgment in the above entitled cause in reversing the judgment of the Superior Court of the State of California.

SUMMARY OF ARGUMENT.

I.

The Court Below Erred in Deciding That No Exportation of the Oil Had Commenced Until After the "Nucula" Had Started From the Marine Terminal to New Zealand. [Point I, pp. 34 to 55; Assignments of Error 1-9, 13 and 14; R. 100-103.]

(1) The decision of the court below that exportation does not start until the goods have been loaded into a vessel and the vessel has started for a foreign port is illogical, and would practically nullify the provisions of Article I, Section 10, Clause 2 of the Constitution, and would do away with none of the evils which it was the object of the Constitution to suppress [p. 34].

(2) The exception permitting the states to levy imposts necessary for the execution of inspection laws demonstrates that it could not have been the intention of the framers of the Constitution that exportation did not start until afer the vessel cleared for a foreign port. [pp. 34 to 36].

(3) The constitutional prohibition against a tax on exports extends to any tax which burdens any phase, incident, or process of exportation. Delivery of the goods to be exported to the vessel that is to carry them to a foreign country is an essential step in the process of exportation [pp. 36 to 37].

(4) To convey the oil from California to New Zealand it was necessary (1) for appellant to pump it into

the tanks of the "Nucula", and (2) for the "Nucula" to convey it from Long Beach to Auckland. Each movement of the oil was as essential to its reaching Auckland as the other. The act of delivering the oil to the "Nucula" was as much a step in and a necessary part of its exportation as its later transportation [pp 38; 49 to 51].

(5) Transportation by water is impossible unless the thing transported is put aboard a ship and the loading of goods upon a vessel is as much a part of the exportation as the movement of the goods by the vessel [p. 38].

(6) The fact which the majority of the court below seemed to think was determinative of the case,—that title passed to the purchaser in California on delivery of the oil to its vessel in California waters,—is quite unimportant. Delivery to a common carrier also would have passed title to the purchaser as effectively as did delivery to the "Nucula" [p. 39].

(7) For the purpose of determining whether articles are imported or exported, the place where title vests is not material, and the determination of the question is governed by matters of substance and not form or the technical procedure with which the transaction is clothed [pp. 40-41].

(8) While the delivery of oil to the "Nucula" passed title to the New Zealand Government, it also irrevocably committed the oil to exportation [p. 41].

(9) The case factually cannot be distinguished from, and is governed by, the decision of this Court in *Spalding & Brothers v. Edwards*, 262 U. S. 66, which is directly contrary to the majority opinion of the court below, and which necessitates reversal of the judgment appealed from [pp. 41 to 46].

(10) Under the California Retail Sales Tax Act no taxable incident occurred until the oil passed the vessel's rail. At that time it was, and since leaving appellant's tanks had been, moving in exportation towards New Zealand [pp. 49 to 51].

(11) The oil was moving in exportation when appellant started pumping it from its tank farm to the storage tanks at the Marine Terminal, and certainly from the storage tanks at the Marine Terminal into the "Nucula" [p. 51].

(12) This Court has held in a long and unbroken line of decisions that exportation starts with the first movement of the goods towards the sea [pp. 51 to 54].

(13) The parties to the sale had no other object than the exportation of oil from California to New Zealand [p. 55].

(14) The delivery of the oil to the "Nucula" cannot be carved out as an independent taxable incident apart from the entire transaction [pp. 54 to 55].

II.

The Court Below Erred in Determining That the Power of the State to Tax Exports Was Co-extensive With Its Power to Tax Interstate Commerce, and That as the Tax Was Nondiscriminatory, It Did Not Violate Article I, Section 10, Clause 2 of the Constitution. [Point II, pp. 56 to 65; Assignments of Error 1, 2, 10, 11, and 14; R. 100, 102-103.]

(1) Except for the decisions of *Department of the Treasury v. Wood Preserving Corporation*, 313 U. S. 62, and *Wisconsin v. J. C. Penney Company*, 311 U. S. 435, all of the cases cited by the majority opinion of the court below sustain the state taxes as there involved, as within the limited power of the states to tax interstate commerce. *Wisconsin v. J. C. Penney Company* is not in point as it does not deal with taxation of interstate or foreign commerce but with the due process clause of the Federal Constitution. The decision of this Court in *International Harvester Company v. Department of Treasury of Indiana*, 322 U. S. 340, 346, shows that the real basis of the decision in *Department of the Treasury v. Wood Preserving Corporation* was that the tax involved in that case was actually sustained upon the ground that it was one within the limited taxing power of the states upon interstate commerce [pp. 56 to 59].

(2) In its decision, the court below entirely overlooked the fact that the Constitution contains no prohibition against taxation of interstate commerce, and hence the states may levy taxes upon such commerce which are not (1) discriminatory, or (2) so burdensome as to in-

terfere with the control of that commerce by Congress. On the other hand, the prohibition against state taxation of exports or imports is absolute and unqualified [pp. 60 to 63].

(3) To sustain the decision of the court below, Clause 2 of Section 10 of Article I of the Constitution must by interpretation be amended so as to read:

"No State shall, without the consent of the Congress, lay any *discriminatory* Imposts or Duties on Imports or Exports" [p. 63].

(a) A single exception being made as to inspection laws clearly shows that the framers of the Constitution did not intend any other exceptions from the absolute prohibition against state taxation of exports [p. 64].

(b) Reading into the clause the word "discriminatory" would grant specific authority to the several States (1) to levy nondiscriminatory imposts upon imports; (2) to levy discriminatory imposts upon both exports and imports for the purpose of executing their inspection laws [pp. 63 to 64].

(c) The objects to be accomplished and the history of Article I, Section 10, Clause 2 show conclusively that the prohibition was intended to be absolute and the states surrendered "altogether" their right to tax imports or exports [pp. 64 to 65].

(4) The fact that the statute is nondiscriminatory is immaterial since the protection afforded exports by Article I, Section 10, Clause 2 is not so restricted [pp. 62 to 63].

(5) The court below was in error in assuming that the framers of the Constitution did not intend to discriminate in favor of exports or imports against domestic transactions since no limitation was placed upon the power of th. ..ates to tax local transactions, whereas state taxation of imports and exports was entirely prohibited [p. 59].

III.

The Court Below Erred in Determining That the Tax Could Be Sustained as an Excise Tax for the Privilege of Conducting a Retail Business in California. [Point III, pp. 66 to 71; Assignments of Error 1, 2, 12 and 14; R. 100, 103.]

(1) While the State of California had a right to impose any tax which it saw fit upon any individual or corporation for the privilege of conducting a retail business within the state, it could not tax the privilege of conducting an export business or exporting goods from the state or making export sales therein [pp. 66 to 67].

(2) The fact that the tax sought to be recovered in this suit was included in the same assessment with other sales taxes properly levied upon intrastate sales by appellant does not validate the tax upon the export sale [p. 71].

ARGUMENT.

That the oil was actually exported from California to New Zealand in conformity with a contract for such exportation is not, and cannot be challenged. Article I, Section 10, Clause 2 of the United States Constitution reads:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's Inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

The final majority opinion of the court below is to the effect that, construing the Sales Tax Act as permitting a tax upon this export sale does not render the statute repugnant to the Constitution. This remarkable conclusion is placed upon three grounds:

1. That, as title passed upon delivery of the oil to the purchaser's vessel, the sale was completed within California, and exportation did not commence until the "Nucula" started to New Zealand.

2. That in effect, the power of the States to tax exports is coextensive with their power to tax interstate commerce transactions, and hence a sales tax on exports is valid if the same tax is laid on a local

sale, notwithstanding the constitutional prohibition against any tax by a state upon exports.

3. That the tax can be sustained as a license tax for the privilege of doing business within the State of California.

The correctness of each of the above grounds is challenged by the appellant's Assignments of Error, the first by Assignments 1 to 9, 13 and 14, [R. 100-103]; the second by 1, 2, 10, 11 and 14, [R. 100-103]; the third by Assignments 1, 2, 12 and 14, [R. 100-103]. We will discuss separately the error of each of the three grounds.

For brevity, we shall refer to the acts of appellant's trustee predecessor in interest as the acts of Richfield or of the appellant.

As heretofore stated, all emphasis throughout the Argument will be ours unless otherwise noted.

I.

The Supreme Court of California Erred in Its Decision That No Exportation of the Oil Commenced Until After the "Nucula" Had Started From the Marine Terminal to New Zealand.

In the final majority opinion of the court below, it is said:

> "But here the delivery of the oil which resulted in the passage of title, and the completion of the sale, and the taxable incident, *occurred prior to the commencement of the exportation.* The delivery of the oil was to the buyer's vessel not a common carrier. The vessel was in California waters and was not bound for any destination *until it started to move from the port. It became the property of the buyer before any movement in the channels of commerce occurred.*"
>
> 163 P. (2d) 2, 3. [R. 88.]

We submit that the slightest reflection will show the error and illogic of this view. If all that was intended by the Constitution was to prohibit taxation of exports after they had been loaded on to a vessel, the prohibition is meaningless and of no practical value. None of the evils which it was the express object of the framers of the Constitution to do away with would have been ended. The seaboard states could have continued to tax the goods sent from other states to be loaded upon ships for transportation to foreign countries. See:

Cook v. Pennsylvania, 97 U. S. 566, 574.

In *Blount v. Munroe*, 60 Ga. 61, 65, 66, the Supreme Court of Georgia, answering a similar contention, said:

> "It cannot be the meaning of the clause of the constitution that it becomes an export when on ship-

board, *and not before;* for the exception in respect to the inspection laws shows that such is not the meaning—those laws being almost always, if not always, without exception, executed on land before shipment."

See *Clarke & Co. v. Clarke* (C. C. Ga.), 3 Woods, 408, 410-11, Federal Cases No. 2846, p. 943 at pp. 944-5, where the Federal Court reached exactly the same conclusion as to a similar situation of a different exporter. There, the court said in part:

"The logs on which the tax was levied were the property of, and were in possession of persons engaged exclusively in exporting timber to foreign countries, they were purchased from citizens of Georgia for the purpose of exportation, they were in a port of the United States awaiting shipment, they had been inspected according to the laws of the state, and the purpose of the owners to export the logs was, after the levy of the tax thereon, actually carried out and the logs were exported.

"It is clear, and it seems to be conceded by defendants, that if the logs had actually been on shipboard when the tax was levied, they might have well been considered exports. *Is the fact that they were still on land, though awaiting shipment, such a circumstance as deprives them of their character as exports?* The reasoning of the court in the case of *Brown v. Maryland*, 12 Wheaton 419, *demonstrates that it is not.*"

After discussing the exception in the clause as to enforcement of inspection laws and giving the exception the same effect as was accorded it by the Georgia Supreme

Court; and after quoting from Mr. Madison's discussion of Clause 2 of Section 10 of Article I at the Virginia Convention which ratified the Constitution, the court continued:

> "But the defendants claim that the tax upon the logs was a tax levied upon the general mass of property in the state, and does not therefore fall within the constitutional prohibition, being neither an 'impost' nor a 'duty.'
>
> "This construction would defeat the purpose of which section 10, article 1, was adopted. *It would put it in the power of the state, by changing the manner of levying the tax, and by giving it another name, to evade the prohibition of the constitution.*"
>
> *Clarke & Co. v. Clarke*, (C. C. Ga.), 3 Woods 408, 411; Federal Cases No. 2846, p. 943 at pp. 944-5.

The above are very early cases, but they have never been questioned and, further, there is no answer to that portion of the decisions pointing out that the exception to the total prohibition against the state tax on exports, "as may be absolutely necessary for executing it's Inspection Laws," shows conclusively that the prohibition was not intended to be limited to a tax upon goods after they have been loaded into the vessel, since such inspections are almost invariably made before the goods are placed aboard the ship.

There is not a single decision of this Court which has considered Article I, Section 10, Clause 2 of the Constitution which has limited or circumscribed it as did the majority opinion of the court below. On the contrary, all of the decisions of this Court which have considered the constitutional prohibition have given it a wide and liberal interpretation in order to effectuate the obvious intention

of the framers of the Constitution that exports should be free from state taxation. To that end, it has been held that the every phase and incident of an export such as bills of lading, charter parties and marine insurance are exempt from state taxation. See:

United States v. Hvoslef, 237 U. S. 1, 13;

Fairbanks v. United States, 181 U. S. 283, 292-3;

Thames & Mersey Insurance Company v. United States, 237 U. S. 19;

N. Y. and Cuba Mail S. S. Co. v. United States, (D. C., N. Y.), 125 Fed. 320.

The observation of Chief Justice Hughes, speaking for this Court in *Willcuts v. Bunn*, 282 U. S. 216, 228, in interpreting the first three of the above decisions, though dictum, is most pertinent:

> "Similarly, with respect to federal taxation of articles exported from any State, the constitutional inhibition gives immunity *to the process of exportation and to the transactions and documents* embraced in that process. Fairbank v. United States, 181 U. S. 283; United States v. Hvoslef, 237 U. S. 1; Thames & Mersey Marine Insurance Company v. United States, 237 U. S. 19. *Only on that construction can the constitutional safeguard be maintained.*"
>
> *Willcuts v. Bunn*, 282 U. S. 216, 228.

Clearly, the delivery of the oil to the "Nucula" was a phase of, and a necessary incident in,—indeed, an essential part of the process of; the exportation of the oil. It was purchased solely for the use of the New Zealand Division of the Royal Navy at Auckland. In order to get it there, it was as essential and as necessary to move the oil from

the appellant's tank farm into the "Nucula" as it was for that vessel to carry it to Auckland.

The decision of this Court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 92, 94, seems to us conclusive on this point and necessitates a reversal of the judgment appealed from. There, the appellant was engaged in several activities, among them loading and unloading ships. The excise tax of the State of Washington required payment of a percentage of gross income for the privilege of doing business in that state. Suit was instituted by the appellant to enjoin the Tax Commission from enforcing the tax on the ground that appellant's work in loading and unloading vessels was interstate and foreign commerce. The suit was dismissed by the trial court and the judgment affirmed by the Supreme Court of Washington. In reversing the latter judgment this Court, speaking through Justice Cardozo, said, in part:

> "Transportation of a cargo by water is impossible or futile *unless the thing to be transported is put aboard the ship* and taken off at destination. A stevedore who in person or by servants does work so indispensable *is as much an agency of commerce as shipowner or master.*
>
> * * * * * * * *
>
> "The business of loading and unloading *being interstate or foreign commerce*, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts."
>
> *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 92, 94.

As we shall hereafter show [pp. 51 to 54], this Court has held in a long and unbroken line of decisions

that exportation commences with the first movement of the goods towards the sea. Clearly, the pumping of the oil from appellant's tanks into the "Nucula" was such a movement.

The majority of the court below in its final decision apparently gave controlling effect to the fact that the delivery of the oil was to the purchaser's vessel, passed title to the purchaser within the State of California. The majority opinion indicates a different result might have been accomplished if the oil had been delivered to a common carrier. But, under the law of California, in the absence of an agreement to the contrary, the delivery of the oil to a common carrier would have equally passed title to the purchaser. See:

Boston etc. Company v. Rosenthal, 68 Cal. App. (2d) 564, 568, 156 P. (2d) 963, 965;

Martyn v. Western Pacific Railway, 21 Cal. App. 589, 595, 132 Pac. 602, 604.

This is the rule in most, if not all, jurisdictions. See:

Spalding & Brothers v. Edwards, 262 U. S. 66, 68, 69;

Nelson Bros. Coal Co. v. Berryman (C. C. A. 2), 48 F. (2d) 99, 100;

In re Globe Varnish Company (C. C. A. 7), 114 F. (2d) 916, 918.

But, the Constitution of the United States does not make the prohibition against a state tax on exports dependent upon whether the title remains in the exporter or vests in the purchaser within or without the United States, or dependent upon whether the article is exported in the seller's vessel, the buyer's vessel, or a common carrier.

The views of the majority of the court below are directly contrary to the recent decision of this Court in *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 662, 663. That case involved the right of the State of Ohio to levy taxes upon fibers which had been imported by the petitioner and stored by it in its warehouse for use in manufacture of its goods. The *ad valorem* tax which the State of Ohio had imposed was sought to be sustained upon two distinct grounds: (1) that as the goods had been imported in the name of a broker, and title passed to the petitioner in this country, there had been a technical sale by the importer; (2) that through the storage by petitioner of the goods they had lost their character as imports. While this Court was divided as to the second ground, we find no dissent from the majority decision on the first ground, wherein it is said:

> "For the purpose of determining whether petitioner was the importer in the constitutional sense, it is immaterial whether the title to the merchandise imported vested in him who caused it to be brought to this country at the time of shipment or only after its arrival here . . . For in determining the meaning and application of the constitutional provision, we are concerned with matters of substance not of form. When the merchandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected."
>
> *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 662, 663.

See, also, to the same effect:

Carson Petroleum Co. v. Vial, 279 U. S. 95, 103;
In re Globe Varnish Company (C. C. A. 7), *supra*, 114 F. (2d) 916.

In the instant case the oil was delivered to the "Nucula" under a written contract providing for its exportation by that vessel to New Zealand, so that no other lawful disposition could have been made of it and, as pointed out in *Spalding & Brothers v. Edwards*, 262 U. S. 66, 67, the very act which vested title in the purchaser *irrevocably committed the oil to exportation*. Indeed, we submit that the instant case cannot be distinguished from the *Spalding & Brothers v. Edwards* case. That action was instituted by the plaintiff to recover from the Collector of Internal Revenue taxes which had been levied under color of the War Revenue Act of October 3, 1917, and paid under protest. The applicable section of the statute is not fully stated in the opinion, but reads:

> "That there shall be levied, assessed, collected and paid—(f) upon all tennis rackets, golf clubs, baseball bats, lacrosse sticks, balls of all kinds, including baseballs, foot balls, * * * sold by the manufacturer, producer, or importer, a tax equivalent to three percentum of the price for which so sold; and * * *." 40 U. S. Stats. at Large, 300, 316.

Delgado & Compania, a commercial firm in the City of La Guaira, Venezuela, ordered Scholtz & Company, commission merchants in New York, to buy for their account and risk a certain number of baseballs and baseball bats at a stipulated price. Scholtz & Company then purchased the required merchandise from the plaintiff, delivering to it a written export order directing the packing

and marking of the goods, and that they be sent to the Atlantic and Caribbean Steam Navigation Company, an exporting carrier in New York. The plaintiff marked and delivered the goods as directed and was given a receipt by the carrier which it sent to Scholtz & Company, and which was exchanged by them for an export bill of lading in their own name. Scholtz & Company paid the plaintiff the agreed price and was later paid its commission by its principals.

The District Court and the Circuit Court of Appeals upheld the tax, but their judgments were reversed by this Court which, speaking through Justice Holmes, said, in part:

> "* * * The question is whether the sale was a step in exportation, assuming as appears to be the fact, that the title passed at the moment when the goods were delivered into the carrier's hands.
>
> "The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant if in this case the tax was 'laid on articles exported from any State', because that is forbidden in terms by the Constitution (citing numerous cases). * * * Articles in course of transportation cannot be taxed (citing case). * * * So we return to the question that we have stated. To answer it with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary. In this case, for instance, while the goods were in process of manufacture they were none the less subject to taxation if

they were intended for export and made with specific reference to foreign wants. Cornell v. Coyne, 192 U. S. 418. Heisler v. Thomas Colliery Co., 260 U. S. 245. On the other hand no one would doubt that they were exempt after they had been loaded upon the vessel for Venezuela and the bill of lading issued. It seems to us that the facts recited are closer to the latter than to the former side, and that the export had begun.

"*The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods.* The expected and accomplished effect of the act was to start them for that port."

Spalding & Brothers v. Edwards, 262 U. S. 66, 68-9.

So, in the instant case, the delivery of the oil into the tanks of the "Nucula" which passed title, irrevocably committed it to exportation. To say that the very act of placing it in the tanks of the "Nucula" can be taxed and the only immunity under the constitutional inhibition was against a tax upon the transportation of the oil by the "Nucula" is illogical and would defeat the very purpose of the constitutional provision.

Justice Holmes, after the portion of his decision quoted, continued:

"* * * The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result. Getting the bill of lading stands no differently from putting the goods on board ship. *Neither does it matter that the title was*

in Scholtz & Co. and that theoretically they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Co., was solely for the purpose of Delgado & Cia. and for their account and risk. *Theoretical possibilities may be left out of account."*

Spalding & Brothers v. Edwards, 262 U. S. 66, 69-70.

In the instant case, there were not even any theoretical possibilities. When the oil was pumped into the tanks of the "Nucula" it passed into the control of a foreign vessel and could not, without violating the contract and the bill of lading, and without compliance with the import laws, be returned to the plaintiff or to any other part of the United States. The delivery to a common carrier would not as completely have committed the oil to exportation, for the appellant would have had the right of stoppage in transit, which of course it lost by delivery to the "Nucula" over whose movements it had absolutely no control.

The Chief Justice of the State of California, speaking for the majority of the court below in its first decision, said, after discussing the decision of this Court in the *Spalding* case:

"Defendant seeks to distinguish the case, however, on the ground that while delivery therein was to a common carrier, delivery in the present case was to the purchaser's carrier. *The distinction is one of form rather than substance.* Delivery of goods to a common carrier for transportation is regarded as the beginning of the export journey because the destination of the goods is thereby fixed and certain. (Cit-

ing cases.) But delivery of the oil to the 'Nucula' in this case as effectively fixed its destination as did the delivery of the goods to the common carrier in the Spalding case. Here, as there, title passed upon delivery, and the passage of title enables the purchaser to change the destination of the goods and thereby evade the tax. But as stated in A. G. Spalding & Bros. v. Edwards, supra, 262 U. S. at page 70, 43 S. Ct. at page 486, 67 L. Ed. 865, 'There was not the slightest probability of any such change and it did not occur,' and 'theoretical possibilities may be left out of account.'

"The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. The means selected in this case in the light of all the circumstances, satisfies that inquiry.

* * * * * * * *

"The present case is even stronger than the Spalding case, for whereas here, the alleged local transaction was a direct sale to the foreign consumer and the oil was actually loaded aboard the carrier, the sale in the Spalding case was to an intermediary and the goods were merely delivered to the carrier."

155 P. (2d) 1, 4, [R. 75-6.]

The same thought was reiterated by the Chief Justice in his dissenting opinion to the final judgment of the court below, and was concurred in by Justice Edmonds [R. 94, 95; 163 P. (2d) 1, 6].

The trial court in its opinion on this subject said:

"Counsel for defendant here admits that in the circumstances of this case that plaintiff could actually export its product without ever coming within

the purview of this taxing statute. It could as consignor deliver to an exporting carrier oil consigned to New Zealand.' This is almost identically what it did.

* * * * * * * *

"Can we say here that if plaintiff had delivered the oil to some form of public carrier, consigned to the New Zealand government, the sale would not have been local nor the tax have applied, but when it does exactly the same thing except that instead of using a public carrier *it uses what should be a more dependable one in the shape of a naval vessel of the government which wanted the oil and sent the vessel here to take it to them, we should say that the sale was local and the tax collectible?*" [R. 37.]

In the final majority opinion of the court below it is said:

"If it had been delivered to a common carrier of export products a different result might be appropriate, for then it would have been placed in the hands of an instrumentality whose *sole purpose* is to export goods, thus indelibly characterizing the process as a part of exportation. Suppose a citizen of Mexico entered this country and purchased a banjo in a store a mile from the border with the unequivocal intent to take it back to Mexico with him and he did so. Would it be doubted that the retailer would be required to pay a tax on the sale? Would the result be any different if the Mexican came by his automobile and either he or the retailer for him placed the banjo in the car? Nor would the conclusion be altered if he gave the retailer an affidavit that he was taking the banjo to Mexico."

163 P. (2d) 3. [R. 88.]

The opinion ignores all essential features of the transaction,—features which it concedes "might" render the transaction one of export if the "Nucula" had been a "common" carrier. In the sale of the banjo nothing is done either by the buyer or the seller which would not be done in the case of *any local sale*. All earmarks of export are absent.

The use of an automobile is not significant, for the automobile may move north, south, east or west freely, without documentation, just as any other customer's car, or just as the purchaser who comes by foot. But the "Nucula" was an ocean-going vessel which could only move upon that channel of commerce and in such a manner as to take the oil without the State of California. Furthermore, any failure to take the oil from California would have been a violation of the contract and the bill of lading.

See:

Hughes Bros. Timber Co. v. Minnesota, 272 U. S. 469, 475, 476.

Unlike the banjo sale, the shipment, as contemplated, as documented, and as actually carried out, was a typical export sale.

The fact that the carrier vessel was owned by the purchaser does not prevent the shipment from being an export. The purpose of the constitutional provision was not to subsidize "common" carriers.

Again, the observation of the trial court on this subject is most appropriate and, we submit, unanswerable:

"The reason for the rule requiring delivery to a common carrier, where such a delivery is required,

is that in that way the shipment is irrevocably consigned to its foreign destination; that there must be no danger as there would be in the case of a private person, that the export might be defeated by some fraudulent arrangement between the shipper and the person.

"Here the oil was loaded upon a war vessel of a responsible foreign government, a vessel under the sole control of the power to which the oil was consigned. *The chance that the oil was not as certain of delivery to its consignee as if it were on a common carrier, is not even speculation.*" [R. 42.]

The trial court, in support of its conclusions, cited *Coe v. Errol*, 116 U. S. 517. The case is also cited in support of the respective conclusions of both the first and second majority opinions of the California Supreme Court, and in the dissenting opinion of the Chief Justice. It is not factually similar to the instant case, but it announces two rules of law, grounded in common sense, to which this Court has consistently adhered:

(1) That goods are not exempt from local taxation merely because they are intended for interstate sale or exportation.

(2) That such immunity attaches as soon as they commence an interstate journey or, in case of their exportation, upon their first movement towards the sea.

Applying these rules to the facts of the instant case, the trial court, the first majority opinion of the California Supreme Court and the dissenting opinion of the Chief Justice to the final majority opinion all concluded that the delivery of the oil to the "Nucula" was an act in its

exportation. The final majority opinion concluded that no exportation movement had occurred prior to the vesting of title in the purchaser, and exportation did not occur until the "Nucula" cleared from the Marine Terminal and started towards Auckland.

We submit that the final opinion is erroneous, and entirely disregards the rule of *Coe v. Errol, supra.* See:

Carson Petroleum Co. v. Vial, supra, 279 U. S. 95, 101.

While the oil was held in the appellant's tank farm at Watson mingled with other oils it was, of course, a part of the mass of property in the state and subject to all state *ad valorem* taxation. But, when the "Nucula" wirelessed her approach, and the appellant started pumping the oil from the tank farm to the storage tanks at the Marine Terminal, its exportation had certainly commenced. Such movement of the oil was not merely a general preparation for a future export, but was itself required by the contract and was made in response to the notice of the vessel's approach [R. 22-3].

It is true that the oil was held for a short space of time in the storage tanks at the Marine Terminal but that did not constitute a breaking of the movement which was resumed as soon as the "Nucula" was ready to receive the oil.

> "There has been a liberal construction of what is continuity of the journey, in cases where the Court finds from the circumstances *that export trade has been actually intended and carried through.*".
>
> *Carson Petroleum Company v. Vial, supra,* 279 U. S. 95, 105-6.

See, also:

Railroad Commission v. Worthington, 225 U. S. 101, 108-11;

Western Oil Refining Company v. Lipscomb, 244 U. S. 346, 349-50.

In the last case cited the State of Tennessee sought to impose a privilege tax upon goods shipped into Tennessee from Indiana, the goods being shipped in cars to the plaintiff at Columbia, Tennessee, where a portion were delivered, and the remainder rebilled to the plaintiff at Mount Pleasant, Tennessee. The Supreme Court of the State held that no tax could be levied upon the goods delivered at Columbia, but that the rebilling of the goods to Mount Pleasant constituted intra-state commerce. In reversing this decision, this Court said, in part:

> "Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one State to another a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. *As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive.*" (Citing a great number of cases.)
>
> "Here, when the cars were started from Illinois and Indiana, it was intended by the shipper, as is expressly conceded, that they should be taken to Columbia, Tennessee, where a portion—a definite portion—of the contents of each was to be taken out and delivered, and that the cars, with the re-

mainder of the contents, should proceed to Mount Pleasant in the same State; *and this is what actually was done.*"

Western Oil Refining Company v. Lipscomb, 244 U. S. 346, 349.

Here, when the oil was started from the tank farm it was intended that it should be placed aboard the "Nucula" for transportation to New Zealand, *and that, in fact, was actually done.*

Clear as it seems to us that the exportation of the oil had commenced when the appellant started pumping it from appellant's tank farm, it is not necessary even to maintain that proposition. Until the oil passed over the vessel's rail, there had been neither delivery of it nor transfer of title, and hence no taxable incident as defined in the Sales Tax Act had occurred. Certainly, when the appellant started pumping oil from its storage tanks at the Marine Terminal towards the vessel's rail its exportation was under way. When, therefore, the oil reached the vessel's rail, it was moving and had been moving from the time it left the tanks in exportation towards New Zealand.

In conformity with the rule of *Coe v. Errol, supra*, this Court has held in an unbroken line of decisions that are unnoticed in the majority opinion (since they cannnot be reconciled with its conclusions), that exportation starts with the first movement of the goods towards the sea.

In *Texas & New Orleans Railroad Company v. Sabine Tram Company*, 227 U. S. 111, defendant in error brought action in the courts of Texas against the railroad company for a refund on freight.

The Tram Company was engaged at Ruliff, Texas, in the manufacture of lumber. The Powell Company was engaged in buying lumber for export to Europe. It purchased the lumber f.o.b. cars at Sabine, and the Tram Company delivered the lumber to the cars of the Texarkana and Fort Smith Railway Company at Ruliff to be transported to Beaumont, its terminus, and hence by the Texas and New Orleans Railway to tidewater at Orange. At the time of purchase and delivery at tidewater, the purchaser, Powell Company, did not know what particular lumber would be shipped to any one port or consigned to any one vessel, the loads being determined by their sales and the arrival of vessels.

The railway charged a rate of 15 cents per hundred pounds permitted by the rates of Interstate Commerce Commission for interstate and export freight. The rate of the Railroad Commission of the State of Texas for intrastate freight was 10 cents per hundred pounds.

The contract of purchase was made, the price paid, the vesting of title to the lumber in Powell Company and the transportation of the lumber, all occurred wholly within the State of Texas. The Sabine Tram Company had no knowledge that the lumber was purchased for export except that at Orange there was no community whose economic needs would require any such amount of lumber. The state courts held the transaction to be intrastate, and hence the Tram Company was entitled to recover the penalties provided by the state law for overcharge. The judgment of the state court was reversed. This Court, speaking through Justice McKenna, said, in part:

> "The determining circumstance is that the shipment of the lumber to Sabine was but a step in its

transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. *Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the interior of a State. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading the commerce will be given local character, though it be essentially foreign.*

"That it is the nature of the traffic and not its accidents which determines its character is illustrated by Ohio Railroad Commission v. Worthington, supra."

Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 126.

See, also, to the same effect:

Railroad Commission of Louisiana v. Texas etc. Co., 229 U. S. 336, 341;

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 526-7;

Hughes Bros. Timber Company v. Minnesota, supra, 272 U. S. 469, 475, 476;

Spalding & Brothers v. Edwards, supra, 262 U. S. 66, 68, 69;

Carson Petroleum Co. v. Vial, supra, 279 U. S. 336-7;

Blount, Sheriff, et al. v. Munroe, supra, 60 Ga. 61, 65-6;

Clarke & Co. v. Clarke, supra, 3 Wood's 408, 410. Federal Cases No. 2846, pp. 943-944-5.

In the first case cited, it is said:

"The principle enunciated in the cases was that *it is the essential character of the commerce, not the accident of local or through bills of lading,* which determines Federal or state control over it. *And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another State or to a foreign country.*"

Railroad Commission of Louisiana v. Texas & Pacific Railway Company, 229 U. S. 336, 341.

The decision of the majority of the court below that the passing of title to the oil constituted a taxable incident separate and independent from its exportation is, without any logical basis and, as we have repeatedly pointed out is a denial of the realities of the case. While dealing with an interstate commerce case, the observations of this Court in the very recent case of *Nippert v. City of Richmond* (not yet officially reported), 90 L. Ed. 496, 500, are most pertinent:

"Appellee's rationalization takes only partial account of the reasoning and policy underlying the Berwind-White decision and its differentiation of the drummer authorities. If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation *and without regard to the substantial economic*

effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. *All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact.* And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result."

Nippert v. Richmond (not yet officially reported), 90 L. Ed. 496, 500.

In the instant case, we submit that there is no basis for even the most hypertechnical contention that a taxable incident had occurred or could be carved out of the transaction prior to the exportation movement of the oil.

The parties to the transaction had no other object than the exportation of the oil from California to New Zealand. The contract, and the documents executed pursuant to the contract, required it, and the delivery of the oil by pumping it into the "Nucula's" tanks was no more an independent incident, separate from its exportation, than was the coming of the "Nucula" to the Marine Terminal and the return of the vessel with the oil to Auckland.

We submit that the first ground upon which the majority opinion of the Supreme Court of California based its final decision is wholly untenable, is both illogical and directly contrary to all of the applicable decisions of this Court, and if sustained, would defeat the manifest intent and purpose of the Constitution.

II.

The Supreme Court of the State of California Erred in Its Determination That the Power of the State to Tax Exports Is Coextensive With Its Power to Tax Interstate Commerce and That Because the Tax Here Levied Was Nondiscriminatory It Did Not Violate the Unqualified Constitutional Prohibition Against Taxation of Imports or Exports.

It is to be noted that the final opinion of the majority of the court below does not cite in support of its conclusions a single decision dealing with exports or imports or with the construction of Article I, Section 10, Clause 2 of the Federal Constitution. The reason is that *none can be found which sustains its decision.* Indeed, we submit that a reading of the majority opinion of the court below will demonstrate that the majority of the court below found it necessary to disregard all of the decisions of this Court in export-import cases.

The majority opinion, however, does cite and comment on a number of decisions of this Court upholding state taxes upon interstate commerce transactions. We think there is no need to review the many cases cited for, with the exception of *Department of the Treasury v. Wood Preserving Corporation, supra,* 313 U. S. 62, and *Wisconsin v. J. C. Penney Company,* 311 U. S. 435, none of them sustains the tax upon the ground that the transaction was local or intrastate, but upon the ground that the several states may tax interstate commerce where the taxes are nondiscriminatory and not of such a nature as unduly to interfere with the control of such commerce by Congress. Indeed, that is the proposition

in support of which they are cited in the majority opinion of the court below. The basis upon which the rule rests is thus stated in the leading case of *McGoldrick v. Berwind-White Coal Mining Company*, 309 U. S. 33, 46:

> "But it was not the purpose of the commerce clause *to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business.* Western Live Stock v. Bureau, 303 U. S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, *which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress.*"
>
> *McGoldrick v. Berwind-White Coal Mining Company*, 309 U. S. 33, 46, 47.

Wisconsin v. J. C. Penney Company, supra, 311 U. S. 435, we do not believe is in point, as it deals neither with the question of taxation of interstate commerce nor of exports, but purely with the due process clause of the Constitution.

In *Department of the Treasury of Indiana v. Wood Preserving Corporation, supra*, 313 U. S. 62, the decision was apparently placed upon the fact that the sale, being completed within Indiana, was an intrastate sale. But we believe that the real basis of the decision was that upon which *McGoldrick v. Berwind-White Coal Mining Company* and other cases are placed. Indeed, in the

succeeding and very recent decision of *International Harvester Co. v. Department of Treasury of Indiana, supra*, 322 U. S. 340, 346, where the same statute was involved and this Court held the case indistinguishable from the *Wood Preserving* case, it is said:

> "Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (Nelson v. Sears Roe-Buck & Co., 312 U. S. 359, 363), we must acknowledge that the sales tax sustained in the Berwind-White case 'was, in form, imposed upon the gross receipts from an interstate sale.' Lockhard, Gross Receipts Taxes on Interstate Transportation and Communication, 57 Harv. L. Rev. 40, 87. But that case did no more than to hold that those in interstate trade could not complain if interstate commerce carried its share of the burdens of local government which helped sustain it. And there was no showing that more than that was being exacted.
>
> * * * * * * * *
>
> "We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way."
>
> *International Harvester Co. v. Department of Treasury of Indiana*, 322 U. S. 340, 346, 349.

See also:

> *Nippert v. City of Richmond, supra* (not yet officially reported), 90 L. Ed. 496, 500.

Although, as noted, none of these cases cited by the majority opinion of the court below in support of its con-

clusions deals with exports or imports or with Article I, Section 10, Clause 2 of the Constitution of the United States, it is in effect held by the majority of the court below that the interstate commerce tax cases cited by it overrule the decisions of this Court in the *Spalding* and other export cases and, in effect, nullify Article I, Section 10, Clause 2 of the Constitution. Thus, after discussing the above mentioned decisions of this Court, the majority opinion of the California Supreme Court concludes:

> "Under the foregoing authorities it is perfectly clear that had this been an interstate transaction it would have been subject to tax. It is inconceivable that the framers of the Constitution ever intended that the export-import clause should be used to discriminate against the states."
>
> 163 P. (2d) 4. [R. 91.]

In answer to a similar contention with reference to imports, this Court said:

> "It is said that our decision will result in discrimination against domestic and in favor of foreign producers of goods. *But such discriminations as there may be are implicit in the constitutional provision and in its purpose to protect imports from state taxation*"
>
> *Hooven & Allison Co. v. Evatt, supra,* 324 U. S. 652, 667-8.

See also:

United States v. County of Allegheny, 322 U. S. 174, 176.

It is obvious that the majority of the court below fell into grievous error in assuming that a state could levy the same tax upon an export sale that it could impose

upon an interstate sale; in other words, that the power of the state to tax imports and exports was coextensive with the power to tax interstate commerce.

In reaching this conclusion the majority of the court below overlooked entirely the great difference in the constitutional provisions as to taxation of imports and exports and interstate commerce. This difference doubtless resulted from the fact that the framers of the Constitution realized that trade between the states and trade between this nation and foreign countries presented entirely different economic and political problems. Imports and exports involve substantial economic and political questions affecting national policy not involved in interstate commerce. In any event, as this Court has many times pointed out, no prohibition was inserted in the Constitution against state taxation of interstate commerce, hence this Court has consistently held that the states are free to tax such commerce, except that they cannot levy taxes upon it which are either discriminatory or which unduly burden such commerce or interfere with the Congressional control thereof.

On the other hand, the Constitution unequivocally prohibits any state without consent of Congress from levying any taxes *of any character, nondiscriminatory or otherwise, upon exports or imports* "except what may be absolutely necessary for executing it's Inspection Laws."

This difference in the constitutional provisions as to the two classes of taxes has often been pointed out by this Court. See:

Woodruff v. Parham, 8 Wall. 123;
Sonneborn Bros. v. Keeling, 262 U. S. 506;
Fairbanks v. United States, 181 U. S. 283, 306.

In its latest consideration of this subject, this Court said:

> "We have often indicated the difference in this respect between the local taxation of imports in the original package *and the like taxation of goods, either before or after their shipment in interstate commerce.* In the one case the *immunity derives from the prohibition upon taxation of the imported merchandise itself.* In the other the immunity is only from such local regulation by taxation, as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not."
>
> *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 665-666.

Many years ago the Supreme Court of California sustained an *ad valorem* tax upon imports in a warehouse upon the ground that as the tax was applicable to all property within the state, it was nondiscriminatory, and hence not within the constitutional prohibition. In reversing the judgment, this Court, speaking through Justice Field, said:

> "The question is not as to the extent of the tax, or its equality with respect to taxes on other property, *but as to the power of the State to levy any tax.*"
>
> *Low v. Austin*, 13 Wall. 29, 34.

In *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 521, in answer to the converse contention that the power of a state to tax interstate transactions was no

greater than its power to tax exports and imports, this Court said:

> "The earnestness with which the contention is pressed induces us, however, briefly to point out the misconception upon which it rests. It results from assuming that the rule which governs in a case *where there is an absolute prohibition is applicable where no such prohibition obtains.*"
>
> *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 521.

See also:

> *United States v. County of Allegheny, supra*, 322 U. S. 174, 176.

This distinction between the powers of a state as to the two classes of taxes also has been clearly recognized by State Courts as well. See:

> *State Board of Equalization v. Blind Bull Coal Co.* (Wyo)., 101 P. (2d) 70, 71, 73;
>
> *Standard Oil Co. v. Johnson*, 56 Cal. App. (2d) 411, 423, 132 P. (2d) 910, 917;
>
> *Washington Chocolate Co. v. King County* (Wash.), 152 P. (2d) 981, 990, 991.

It seems to us that the decision of this Court in *Murdock v. Pennsylvania*, 319 U. S. 105, 115, is conclusive that the majority of the court below erred in deciding that because the sales tax was nondiscriminatory the California statute was not repugnant to the Constitution if

construed and applied as imposing a tax upon an export sale.

> "The fact that the ordinance is 'nondiscriminatory' is immaterial. *The protection afforded by the First Amendment is not so restricted.*"
>
> *Murdock v. Pennsylvania,* 319 U. S. 105, 115.

There is even more reason to apply the above decision to the second clause of Article I, Section 10, than to the First Amendment to the Constitution.

The court below interpreted and enforced the Constitution as though Clause 2 of Article I, Section 10 read:

> "No State shall, without the Consent of Congress, lay any *discriminatory* Imposts or Duties on Imports or Exports * * *"

We submit that to affirm the decision of the court below it is necessary for this Court likewise by interpretation so to amend the Constitution.

It is obvious from both the language and the history of the Constitution that no such modification of the clear, unqualified prohibitions of Clause 2 was ever contemplated by the framers of the Constitution and would have been instantly rejected if suggested.

At the outset, it is to be noted that the prohibition is not on exports alone, but upon imports as well, and hence to read into the clause the word "discriminatory" would grant the specific right to the states to levy nondiscriminatory imposts or taxes upon imports—a though which was directly contrary to the intention of the framers of the Constitution. See:

Low v. Austin, supra, 13 Wall. 29.

The majority decision of the court below is directly contrary to the decision of this Court in *Crew Levick v. Pennsylvania*, 245 U. S. 292, 295, 297-8, where this Court held that an excise tax from gross receipts of sales for the privilege of conducting sales within Pennsylvania was in contravention of the Constitution when applied to export sales, saying in part

> "That it applies to internal as well as to foreign commerce can not save it; * * *"

Next, it is to be noted that immediately following the prohibition of the clause is the provision:

> "* * * except what may be absolutely necessary for executing it's Inspection Laws * * *"

First, the very fact of a single exception shows that no other limitation upon the absolute prohibition was intended by the framers of the Constitution. Second, if the clause be amended so as to insert the word "discriminatory," then the exception and amendment together would grant a clear right to each of the states to levy *discriminatory taxes for the execution of its inspection laws.*

We submit it is equally clear from the evils which the constitutional prohibition was intended to correct and from its history as shown by the Constitutional Debates, that the framers of the Constitution had no idea other than that of an unlimited and unqualified prohibition against state taxes upon either exports or imports. See:

Cook v. Pennsylvania, supra, 97 U. S. 566, 574;

Clark & Co. v. Clarke, supra, 3 Woods 408, 410, Federal Cases No. 2846, pp. 943, 945.

> "In arguing the case of M'Culloch v. Maryland, Luther Martin, Attorney General of Maryland, him-

self a member of the Constitutional Convention, said, 'The whole of this subject of taxation is full of difculties, which the Convention found it impossible to solve, in a manner entirely satisfactory. The first attempt was to divide the subjects of taxation between the State and the national government. This being found impracticable, or inconvenient, the State governments surrendered *altogether* their right to tax *imports and exports,* and tonnage; giving the authority to tax all other subjects to Congress, but reserving to the States a concurrent right to tax the same subjects to an unlimited extent.' "

United States v. County of Allegheny, supra, 322 U. S. 174, 176.

Necessarily, if the states surrendered "altogether" their right to tax exports and imports, reserving the concurrent right with Congress of taxation of other subjects, it is beyond the power of any state to levy a tax of any character upon exports or imports, except such as is necessary to enforce its inspection laws. There is no pretense that the tax here involved was for that purpose. Nor is there any pretense that the Congress of the United States had given its consent to the levying of such tax; or that if collected, it would be for the use of the Treasury of the United States.

We submit that the second ground upon which the court below placed its decision is wholly illogical and is as unsupported in principle and as contrary to the decisions of this Court as are each of the other two grounds upon which it is placed.

III.

The Supreme Court of the State of California Erred in Determining That the Tax Could be Sustained as an Excise Tax for the Privilege of Conducting a Retail Business in California.

At the outset of the final majority opinion of the court below, after a statement of facts and an outline of the Sales Tax Act, it is said:

> "In construing the above statutory provisions it has been definitely and squarely held by the courts of this state that:
>
> "'The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, *but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales.*'"
>
> 163 P. (2d) 1, 2. [R. 87.]

The opinion concludes thus:

> "In the instant case the tax imposed was a uniform nondiscriminatory excise tax *on the privilege of doing business in this state.* The transactions which was the basis for the tax was the sale of oil which was produced, refined, stored and delivered to the purchaser in this state."
>
> 163 P. (2d) 1, 5. [R. 92.]

We submit that the tax cannot be sustained upon this ground. The State of California, of course, can levy an excise tax upon individuals or corporations, foreign or domestic, for the privilege of transacting any intrastate

business within California. But it should be clear in principle, even without reference to the unbroken line of decisions by this Court to that effect, that no state can levy an excise tax upon anyone for the privilege of doing an import or export business or of making import or export sales. In view of the decisions of this Court thereon, further argument is unnecessary.

> "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."
>
> *Murdock v. Pennsylvania, supra,* 319 U. S. 105, 112.

In the early and famous case of *Brown v. Maryland,* 12 Wheat. 419, this Court speaking through Chief Justice Marshall, in rejecting the claim of Maryland that while it could not tax imports it could levy a tax upon the privilege of selling imports, said, in part:

> "The cause depends entirely on the question, whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported. * * *
>
> "But should it be proved, that a duty on the article itself would be repugnant to the constitution, it is still argued, that this is not a tax upon the article, but on the person. *The state, is said, may tax occupations, and this is nothing more.* It is impossible to conceal from ourselves, *that this is varying the form, without varying the substance.* It is treating a prohibition, which is *general, as if it were confined to a particular mode of doing the forbidden thing.* All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the state may tax occupations generally, but this tax must be paid by those

who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. *So, a tax on the occupation of an importer is, in like manner, a tax on importation.* It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. *This the state has not a right to do, because it is prohibited by the constitution.*"

Brown v. *Maryland*, 12 Wheat. 419, 436, 444.

It is obvious, of course, that the rule applies with equal force to a tax upon the privilege of making export sales.

The mere fact, stressed by the majority opinion of the court below, that the oil had been produced in California cannot give the state the right to tax its exportation. All exports must be the product of some one of the states.

Following the quoted portion of the opinion in *Brown v. Maryland*, Justice Marshall continued:

"In support of the argument, that the prohibition ceases, the instant the goods are brought into the country, a comparison has been drawn between the opposite words export and import. As, to export, it is said, means only to carry goods out of the country; so, to import, means only to bring them into it. But suppose, we extend this comparison to the two prohibitions. The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any state. There is some diversity in language, but none is per-

ceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the states. *Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?* Or, suppose, revenue-cutters were to be stationed off the coast, for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased, the instant they were brought into the country, so the prohibition to tax articles exported ceased, when they were carried out of the country?"

Brown v. Maryland, 12 Wheat. 419, 445.

While in *Hooven & Allison Co. v. Evatt, supra*, 324 U. S. 652, this Court was divided as to whether the acts of the petitioner after it received the imported goods divested them of their character as imports, all of the justices were unanimous in the view that the above rules of *Brown v. Maryland* were as valid today as when first promulgated by Chief Justice Marshall. See, also:

Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, 226-9;

Low v. Austin, supra, 13 Wall. 29;

United States v. Hvoslef, supra, 237 U. S. 1, 13;

Almy v. California, 24 Howard 169;

Wm. E. Peck & Co. v. Lowe, 247 U. S. 165, 173.

"1. Since Brown v. Maryland, 12 Wheat. 419, it has not been open to question that taxation imposed by the States upon imported goods, whether levied directly on the goods imported or indirectly by burdening the right to dispose of them, is repugnant to that provision of the Constitution . . ."

American Steel & Wire Co. v. Speed, supra, 192 U. S. 500, 519.

We submit the tax in this case cannot be distinguished from that condemned in *Crew Levick Company v. Pennsylvania, supra*, 245 U. S. 292, 295, 297-8. There, the statute of Pennsylvania, for the privilege of conducting business within the state, exacted a license of $3.00 upon each wholesale vendor and ½ mill on each dollar of the whole volume of business transacted annually, and like taxes at another rate on retail vendors. The appellant had made sales of $47,000 within Pennsylvania and $430,000 in foreign countries. A tax was levied of ½ mill upon its entire gross sales. Appellant by the action challenged the portion of the tax applicable to its export sales. In sustaining its contention and reversing the judgment of the Supreme Court of Pennsylvania, this Court said, in part:

"The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution.

* * * * * * * *

"We are constrained to hold that the answer must be in the affirmative.

* * * * * * * *

"That it applies to internal as well as to foreign commerce cannot save it; for, as was said in Case of the State Freight Tax, 15 Wall. 232, 277, 'The State may tax its internal commerce, *but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State.*' That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."

Crew Levick Company v. Pennsylvania, 245 U. S. 292, 295, 297-298;

See, also:

Anglo-Chilean Nitrate Sales Corp. v. Alabama, supra, 288 U. S. 218, 226-9.

It should require neither reason nor authority to demonstrate that a tax upon the proceeds of an export sale is in effect a tax upon an export. But it is immaterial whether the tax be regarded as a direct tax upon the export or a tax for the privilege of exporting goods or of making an export sale, since a tax upon the privilege of exporting goods or making an export sale is as offensive to the Federal Constitution as a direct tax upon the goods exported.

We submit that the third ground upon which the majority opinion is based is as fundamentally unsound, as erroneous, and as contrary to the decisions of this Court as the two preceding grounds.

Conclusion.

From the inception of the negotiations, both parties to the transaction had but one thing in mind: the exportation of oil to Auckland. The original invitation for bids called for furnishing oil for the New Zealand Division of the Royal Navy, the successful bidder to deliver it to the Control Board's vessel for transportation to new Zealand. Richfield being the successful bidder, a contract was entered into in New Zealand for the delivery of the oil to the purchaser's vessel with the necessary documents for its exportation, including the execution and delivery of a bill of lading consigning it to the Officer in Charge, Auckland, New Zealand. Thereafter, every step taken by either of the parties—the coming of the "Nucula" to the Marine Terminal, the pumping of the oil by appellant from its tank farm to its tanks at the Marine Terminal and from those tanks into the "Nucula," the execution of the bill of lading, export declaration and other shipping documents, were all steps incident and necessary to and a part of the exportation of the oil.

The decision of the court below, as we have pointed out, ignores the actualities of the case—that it was legally impossible after the oil was received by the "Nucula" to do other than take it to New Zealand, and that the delivery to the "Nucula" was as much a part of and as necessary to its exportation as was its carriage by the "Nucula" to New Zealand.

To say that this export sale is still subject to tax because the oil was conveyed from California to New Zea-

land by the purchaser is, we believe, to disregard entirely the Constitution and, in effect, to nullify its provisions. To say that the tax can be sustained because the same tax could have been levied upon an intrastate, and possibly upon an interstate, sale is likewise to ignore the provisions of the Constitution and would necessitate, as we have pointed out, an interpretative amendment by inserting the word "discriminatory" in the clause of the Constitution.

The attempt of the court below to sustain the tax on the ground that it is a tax upon the privilege of conducting business within this State is fallacious, contrary to both the letter and spirit of the Constitution and all the applicable decisions of this Court. It is true, as shown by the majority opinion of the court below, that the statute has been construed as levying a tax on the privilege of making retail sales within California. Limited to local sales, the act offends no provision of the Federal Constitution. When construed and applied, as it was by a majority of the court below, as requiring the same sales tax upon exports or upon the privilege of exporting goods, it offends the clear and unequivocal prohibition of the Constitution that no state, without the consent of Congress, shall levy any tax upon imports or exports.

We respectfully but confidently submit that we have sustained each and every Assignment of Error, all of

which are summarized in our Fourteenth and final Assignment, that:

> "The Supreme Court of the State of California erred in its final judgment in the above entitled cause in reversing the judgment of the Superior Court of the State of California."

We respectfully submit that the judgment appealed from should be reversed.

NORMAN S. STERRY,
ROBERT E. PARADISE,
Counsel for Appellant.

GIBSON, DUNN & CRUTCHER,
LLOYD & PARADISE,
Of Counsel.

APPENDIX.

The following are the applicable provisions of the Retail Sales Tax Act of 1933, as amended, and as in effect at the time of the sale and delivery of the oil to the New Zealand Government, other than Sections 23 and 31, which deal with the procedure by which an improperly or invalidly levied tax could be recovered and which are set forth as they existed at the time of the filing of the appellant's claim for refund and complaint. The appendix was submitted to counsel for appellee before being printed and counsel for the appellee have advised counsel for appellant that appellee agrees that the following sections are the applicable portions of the statute.

"§2. **Definitions.** The following words, terms and phrases when used in this act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

"(a) 'Person' includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, this State, any county, city and county, municipality, district or other political subdivision thereof, or any other group or combination acting as a unit, and the plural as well as the singular number.

"(b) 'Sale' means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration, and includes the fabrication of tangible personal property for consumers who furnish either directly or indirectly the materials used in the fabrication work and the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of

the person furnishing, preparing or serving such tangible personal property. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale.

"(c) A 'retail sale' or 'sale at retail' means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property, except that the expressions 'transfer of possession,' 'lease,' and 'rental' as used in subdivision (b) of this section shall mean and include only such transactions as the board, upon investigation, finds to be in lieu of sales as defined in subdivision (b) of this section without the words 'lease or rental.'

"(d) 'Business' includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

"(e) 'Retailer' includes every person engaged in the business of making sales at retail; provided, however, that when in the opinion of the board it is necessary for the efficient administration of this act to regard any salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers, the board may so regard them and may regard the dealers, distributors, supervisors or employers as retailers for purposes of this act.

"(f) 'Gross receipts' means the total amount of the sale or lease or rental price, as the case may be, of the retail

sales of retailers, including any services that are a part of such sales, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, and also any amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses or any other expense whatsoever; provided, however, that cash discounts allowed and taken on sales shall not be included, and 'gross receipts' shall not include the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit, nor shall 'gross receipts' include the price received for labor or services used in installing, applying, remodeling or repairing the property sold.

"For the purpose of this act the total amount of the sale price above mentioned shall be deemed to be the amount received exclusive of the tax hereby imposed; provided, that the retailers shall establish to the satisfaction of the board that the tax imposed hereunder had been added to the sale price and not absorbed by the retailer.

"(g) 'Board' means the State Board of Equalization.

"(h) 'Tangible personal property' means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses.

"(i) 'In this State' or 'in the State' means within the exterior limits of the State of California and includes all territory within such limits owned by or ceded to the United States of America. (Amendment approved June 25, 1935; Stats. 1935, p. 1256.)"

Deering's General Laws of California 1935 Supplement, pp. 1956 and 1957.

"§3. **Rate of Tax.** For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of two and one-half per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. Such tax shall be paid at the time and in the manner hereinafter provided and shall be in addition to any and all other taxes. (Amendment approved June 25, 1935; Stats. 1935, p. 1252.)"

Deering's General Laws of California 1935 Supplement, pp. 1957 and 1958.

* * * * * * * * *

"§5. **Exemptions.** There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed or payable under this act the following:

"(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State.

"* * * * * * * * *"

Deering's General Laws of California 1935 Supplement, p. 1958.

* * * * * * * * *

"§8. **Unlawful to advertise absorption of tax.** It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

"§8½ **Retailer to collect tax.** The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done. This section is hereby declared to be separable and distinct from all other portions of this act, and shall not be deemed a consideration or inducement for the enactment of the whole or any portion of this act. If this section be for any reason declared invalid, the remainder of this act shall remain in full force and effect and shall be as completely operative as though this section had not been included herein."

1937 Vol. 2, Deering's General Laws of California, p. 3895.

* * * * * * * * *

"§12. **Retailer's permit: Application: Violation of section a misdemeanor.** Thirty days after the effective date of this act, it shall be unlawful for any person to engage in or transact business as a retailer within this State, unless a permit or permits shall have been issued to him as hereinafter prescribed. Every person desiring to engage in or conduct business as a retailer within this State shall file with the board an application for a permit or permits. Every application for such a permit shall be

made upon a form prescribed by the said board and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the board may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner thereof; in the case of a corporation, by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority.

"*Violation of section a misdemeanor.* Any person who engages in the business of selling tangible personal property at retail in this State without a permit or permits or after a permit has been suspended, and the officers of any corporation which shall so sell, shall be guilty of a misdemeanor."

1937 Vol. 2, Deering's General Laws of California, pp. 3896 and 3897.

"§13. **Permit fee.** At the time of making such application, the applicant shall pay to the board a permit fee of one dollar for each permit and the applicant must have a permit for each place of business."

1937 Vol. 2, Deering's General Laws of California, p. 3897.

* * * * * * * * *

"§15. **Life of permit: Renewal fee.** Permits issued under the provisions of this act prior to April 1, 1935, shall expire on July 31, 1935, and must be renewed through filing an application for renewal on forms prescribed by the board. For each such renewal a fee of one

dollar must be paid at the time of filing the application therefor. If any retailer shall fail to apply for renewal of his permit or permits as herein required prior to August 1, 1935, a fee of one dollar and fifty cents must be paid for the renewal of each permit.

"*Renewal fee.* The board shall charge a fee of one dollar for the renewal or issuance of a permit to a retailer whose permit has been previously suspended or revoked. (Amendment approved June 25, 1935; Stats. 1935, p. 1259.)"

Deering's General Laws of California 1935 Supplement, p. 1959.

* * * * * * * * * *

"§23. **Overpayments: Credits and refunds: Claims: Interest: Recovery of erroneous refunds and credits: Illegal levies: Intentional overpayments.** If the board determines that any amount, penalty or interest has been paid more than once, or has been erroneously or illegally collected, the board shall set forth that fact in the records of the board and shall certify to the State Board of Control the amount collected in excess of what was legally due, and the person from whom it was collected, or by whom paid, and if approved by the State Board of Control the excess amount collected or paid shall be credited on any taxes then due from the retailer under this act or under the California Use Tax Act of 1935 and the balance shall be refunded to the person, or his successors, administrators, or executors. No refund shall be allowed unless a claim therefor is filed with the State Board of Equalization within three years from the fif-

teenth day after the close of the quarterly period for which the overpayment was made or, with respect to assessments made under the provisions of Sections 17 and 18 hereof, within six months after such assessments became final, or within 60 days from the date of overpayment, whichever period expires the later. No credit shall be allowed after the expiration of the period specified for filing claims for refund unless a claim for credit is filed with the board within such period.

Every such claim must be in writing and must state the specific grounds upon which the claim is founded.

Failure to file such claim within the time prescribed in this section shall constitute waiver of any and all demands against this State on account of overpayments hereunder within 30 days after disallowing any such claim in whole or in part, the board shall serve notice of such action on the claimant, such service to be made as provided by Section 17 hereof.

* * * * * * * * * *

(Amended by Stats. 1941, ch. 247, p. 1328, Sec. 10; Effective May 13, 1941; Operative July 1, 1941.)"

Deering's General Laws, Supp. 1941, pp. 2321-2.

"§31. **Remedies of taxpayer: Action to recover tax paid: Prerequisites to action: Time for commencement: Execution of judgment: Assignees.** No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the collection under this act of any tax sought to be collected, and no suit or proceeding shall be main-

tained in any court for the recovery of any amount alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been duly filed as provided in Section 23 hereof.

"*Time for commencement.* Within ninety days after the mailing of the notice of the board's action upon such claim, the claimant may bring an action against the board on the grounds set forth in such claim in a court of competent jurisdiction in the county of Sacramento for the recovery of the whole or any part of the amount with respect to which such claim has been disallowed. If the board fails to mail notice of action on any such claim within six months after the claim is filed the claimant may, prior to mailing notice of action on such claim by the board, consider the claim disallowed and bring an action against the board on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment. Failure to bring suit or action within the time specified shall constitute a waiver of any and all demands against this State on account of any alleged overpayments hereunder.

"* * * * * * * * *"

Deering's General Laws of California, 1939 Supplement, p. 1589.